No. 87-161

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JOHNNY COPELAND,

Petitioner,

– v. –

RICHARD L. DUGGER,

Secretary, Department of
Corrections, State of Florida,

and

STATE OF FLORIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY MEMORANDUM

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The "Brief of Respondents" filed in the above-captioned matter in response to Copeland's petition for certiorari urges the Court to grant certiorari in this case, but upon grounds wholly different from those urged in the petition. Thus, the "Brief of Respondents" is in reality an

untimely and improper cross-petition for certiorari. It seeks an advisory opinion, since the result below would not alter if the Court granted the cross-petition and sustained the respondents' position. In any event, this case is not an appropriate one for the resolution of those questions, which were never addressed by the State courts below.

I.

RESPONDENTS' IMPROPER CROSS-PETITION FOR CERTIORARI MUST BE DISMISSED

Rule 22.1 of the Rules of the Supreme Court of the United States requires that a brief in opposition to the petition for certiorari should "disclos[e] any matter or ground why the cause should not be reviewed by this Court." The "Brief of Respondents," however, advances no reason why Copeland's petition for certiorari should be denied.

Instead, the "Brief of Respondents" urges this Court to grant certiorari to review, not the questions presented in Copeland's petition, but two wholly different questions not "set forth in the petition or fairly included therein." Rule 21.1(a). The "Brief of Respondents" should therefore be treated as a cross-petition for certiorari.

The cross-petition was filed on July 23, 1987, 107 days after the judgment of the Supreme Court of Florida. It is therefore untimely under Rule 20, unless it may be treated as having been properly filed under Rule 19.5.

Rule 19.5 allows a cross-petition for certiorari to be filed not more than 30 days after receipt of the petition for certiorari, but only if the cross-petitioner complies with the provisions of the Rule. The cross-petitioner must "enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with the provisions of Rule 21."

Respondents did none of these things. Instead, they filed their cross-petition in the formal guise of a brief in opposition to Copeland's petition for certiorari. Therefore, they cannot be deemed to have filed under Rule 19.5. Their cross-petition for certiorari should be dismissed as untimely.

II.

THE CROSS-PETITION SEEKS AN ADVISORY OPINION

The two questions that the cross-petition urges this Court to decide are not properly presented by the facts of this case. They were not raised by the parties nor

passed upon by the Florida Supreme Court in its decision below.

Furthermore, the resolution of these questions would not determine the validity of the judgment below. Copeland's conviction -- which he has now collaterally attacked in the Florida state courts and with respect to which he has sought review by this Court -- was affirmed. Thus, the cross-petition is no more than a request that this Court provide an advisory opinion concerning the two legal theories that the cross-petition has suggested as alternative grounds for the decision below. Such advisory opinions are, of course, forbidden by Article III. *See Flast* v. *Cohen*, 392 U.S. 83, 94-95 (1968); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

III.

NEITHER OF THE QUESTIONS PRESENTED IN THE CROSS-PETITION IS WORTHY OF CERTIORARI REVIEW

Wainwright v. *Sykes* **and** *Engle v. Isaac* **are inapplicable.**

Respondents request the Court to determine "the applicability of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) and *Engle* v. *Issac*, 456 U.S. 107 (1982) to claims of sentencing error founded upon this court's decision in *Hitchcock* v. *Dugger*, ____ U.S. ____, 107 S. Ct. 1826 (1987)." This case is not an appropriate one for the reso-

lution of that question. *Sykes* and *Engle* concern the applicability of state procedural bars to claims raised in *federal* habeas corpus actions. This case, however, does not concern a federal habeas corpus action. Copeland instead is seeking a writ of certiorari to the Florida Supreme Court for review of its denial of relief in *state* post-conviction proceedings. *Sykes* and *Engle* are therefore simply inapposite.

The error in this case cannot be harmless.

Respondents have urged that this case is an appropriate vehicle to determine whether claims under this Court's recent *Hitchcock* decision are subject to harmless error analysis.

Again, however, the facts of this case do not present the proper context for deciding that question. Even assuming that *Hitchcock* claims are subject to harmless error analysis, respondents could not possibly meet the burden of showing that the error in this case was harmless. As discussed in Copeland's petition, extensive mitigating evidence was not presented to the jury. Moreover, the instructions given to the jury precluded them from considering the non-statutory mitigating evidence that was presented (a fact respondents conspicuously ignore). Nonetheless, two of twelve jurors recommended that the death sentence not be imposed. Respondents sim-

ply cannot show beyond a reasonable doubt that if the jury had been permitted to consider the evidence of other mitigating circumstances -- such as mental retardation, psychological disturbance, and drug abuse -- a majority would not have voted for a life sentence.

Conclusion

For these reasons, Copeland's petition for certiorari should be granted and the cross-petition for certiorari should be denied.

Respectfully submitted,

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